No. 161

In the Supreme Court of the United States

OCTOBER TERM, 1958

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

KENTUCKY FINANCE COMPANY, INC. AND KENTUCKY DISCOUNT, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D. C.

STUART ROTHMAN,
Solicitor,
BESSIE MARGOLIN,
Assistant Solicitor,
SYLVIA S. ELLISON,
Attorney,
Department of Labor, Washington 25, D. C.

INDEX

492170—59——1

CITATIONS

Cases:

Miscellaneous—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 161

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

KENTUCKY FINANCE COMPANY, INC. AND KENTUCKY DISCOUNT, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 82–84) are reported at 150 F. Supp. 368. The opinion of the Court of Appeals (R. 356–361) is reported at 254 F. 2d 8.

JURISDICTION

The judgment of the Court of Appeals was entered April 15, 1958. The petition for a writ of certiorari was filed July 9, 1958, and was granted October 13, 1958 (R. 361). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the business of making small loans on credit and purchasing accounts receivable (*i. e.*, conditional sales contracts) constitutes "sales of * * * services" by a "retail or service establishment" within the meaning of the exemption provided in Section 13 (a) (2) of the Fair Labor Standards Act.

STATUTE INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U. S. C. 201, *et seq.*), are set forth in the Appendix, *infra,* pp. 58–59. The provision particularly involved here is Section 13 (a) (2) which reads as follows:

> The provisions of sections 6 and 7 shall not apply with respect to * * * any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; * * *.

STATEMENT

This action was brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act to enjoin respondents from violating the overtime and record-keeping provisions of the Act with respect to

office workers jointly employed by them in their loan and discount business.

1. Respondents are affiliated corporations and wholly owned subsidiaries of Kentucky Finance Co., Inc., whose principal office is in Lexington, Kentucky (R. 7).[1] They have a common manager (R. 27) and use a common office force consisting of nine full-time and two part-time employees (R. 4). They maintain a joint office in Louisville, Kentucky, where they are engaged in lending money on credit to borrowers, resident in Kentucky and Indiana (R. 10; also, Fdg. 6, R. 82), at the maximum interest rate permitted by Kentucky's small loan act;[2] in selling these borrowers protective life insurance (R. 8) which is issued by The Credit Life Insurance Company of Springfield, Ohio (R. 39); and in purchasing accounts receivable (conditional sales contracts) from appliance and furniture dealers (R. 9; 29–37; Fdg. 4, R. 82). As the trial court found, respondents' small loan business accounts for approximately 60 percent of the gross dollar volume of their business, the remaining 40 percent being derived from the discount phase of their business (Fdg. 5, R. 82).

2. In a pre-trial stipulation, respondents admitted non-compliance with the Act's overtime and record-keeping provisions (R. 6). At the trial, they conceded that their joint office employees were "engaged

[1] Their exact corporate names are "Ky. Finance Co., Inc., No. 1, Louisville, Ky." and "Ky. Discount, Inc., Louisville, Ky." (Stip., par. 5, R. 7).

[2] These rates are 3½ percent per month on unpaid balances not exceeding $150, and 2½ percent per month on any part thereof exceeding $150 (Kentucky Revised Statutes, Ch. 288).

in commerce or in the production of goods for commerce" within the meaning of the Act, and that an injunction should issue unless, as they contended, they are entitled to the amended "retail or service establishment" exemption provided in Section 13 (a) (2) of the Act (R. 16–18; see also the opinion below, R. 358). With the case in this posture, respondents endeavored to show that, in lending money and buying accounts receivable, they were making "sales of * * * services" which were "recognized as retail" in the industry. In addition, since the legislative history of this exemption indicated (by express statements in the reports of both Houses of Congress) that the provision was not intended for such businesses as "banks, insurance companies, building and loan associations, [and] credit companies" (House Managers' Statement, 95 Cong. Rec. 14932; Senate Conferees' Report, 95 Cong. Rec. 14877), respondents also sought to show that the term "credit companies" does not include small loan companies. The bulk of the evidence in this voluminous record relates to these contentions.

Respondents' evidence consists of the "expert" testimony of Dr. Morris R. Neifeld and similar evidence and exhibits used by Household Finance Corporation in *Tobin* v. *Household Finance Corp.*, 106 F. Supp. 541 (E. D. Pa.), reversed, 208 F. 2d 667 (C. A. 3), rehearing denied, 208 F. 2d 672, it having been stipulated that the record in that case might be offered in evidence in the instant case (R. 13–14), and this

was done (R. 75–77).[3] Dr. Neifeld, an economist, is Vice-President and a director of Beneficial Management Corporation, the managing corporation of Beneficial Finance Company, a nationwide chain of loan companies (see footnote 3, *supra*). Respondents' other principal witness, Leon Henderson, testified in the *Household* case. His testimony was "based on his experience, commencing with his work with the Russell Sage Foundation, and the studies made in connection therewith" (respondents' brief below, p. 7).[4]

[3] The reversal in *Household* was based solely on the ground that there was no employment in commerce within the meaning of the Act. Accordingly, the Third Circuit found it "unnecessary to go into the question whether the defendant is within the 'retail or service' exception to the statute" (208 F. 2d at 672), and left the District Court's ruling on that question undisturbed. The Government's position on coverage, as well as on the exemption issue, was subsequently upheld in *Aetna Finance Co.* v. *Mitchell*, 247 F. 2d 190 (C. A. 1), affirming 144 F. Supp. 528.

Both *Household* and *Aetna* involved branch offices of large nationwide chain organizations. Although respondents in the instant case are not part of a nationwide chain organization, most of the small loan offices in the country are operated by such organizations. The six largest are Beneficial Finance Company, with 972 branches located in 44 states and in Canada and Hawaii (R. 42–44); Household Finance Corporation, with 738 branches in 35 states and Canada; Seaboard Finance Company, with 291 branches in 31 states; American Investment Company of Illinois, with 359 branches in 28 states; Family Finance Corporation, with 203 offices in 28 states; and Liberty Loan Corporation, with 110 offices in 13 states (see Moody's Bank and Financial Manual, 1956).

[4] These studies had to do with the "small loan problem" (R. 257). As a result of them, the Russell Sage Foundation recommended passage of small loan legislation that would permit a maximum interest rate of 3.5 percent a month on loans under $300.00.

3. Although the Government believes it is clear that there are some types of businesses which are not eligible for the Section 13 (a) (2) exemption regardless of the amount or kind of evidence that might be adduced, and that one of these is the money lending business, the Government took the precaution of presenting rebuttal evidence in *Household;* by stipulation, that evidence is also a part of the record in the instant case. It consists of the testimony of three economists, all well versed in the operation of the small loan business and the position it occupies in the financial industry and in the general organization of our economy:—Donald F. Blankertz, acknowledged by the defendants in the *Household Finance* case to be "one of the outstanding men" in the "field of marketing and retailing," Associate Professor of Marketing at the Wharton School of Commerce and Finance, University of Pennsylvania, and a member of the Wholesale and Retail Trades Division, Office of Civilian Supply (R. 341); David C. Melnicoff who, as Head of the Department of Selective Credit Regulations of the Federal Reserve Bank of Philadelphia, administered regulations in the field of consumer credit, and made studies and reports with respect to small loan companies within the jurisdiction of the Philadelphia Board (R. 331–332); and Charles R. Whittlesey, Professor of Finance and Economics, Wharton School of Commerce and Finance, University of Pennsylvania, and Economist for the Penn Mutual Life Insurance Company, who was formerly an economist for the Fidelity-Philadelphia Trust

Company, and a member of the staff of the National Bureau of Economic Research (R. 160–161).

All of the Government's expert witnesses testified that the business of lending money is not recognized as "selling services"[5] within the generally accepted business and economic use of that term in the field of marketing or retailing. They testified that, while "the word 'services' used in a very broad generic sense will apply to any economic endeavor in our economy, in our social system,"[6] the small loan company is not a "service" establishment "within the generally accepted meaning of the word as it is used in the business community, in economic discussions, economic analyses and so on * * * that that term is reserved for other types of functions" and that "the financial industry as a group of establishments or businesses of related nature * * * is doing something else, something which can be more specific than that" (R.

[5] Respondents have never contended that they make sales of "goods" within the meaning of the exemption. On the contrary, it was expressly stipulated in the *Household* record that this type of company is not engaged in sales of "goods" (R. 349).

[6] This was the broad theory on which respondents' expert witnesses premised their opinion that the making of loans was a "service" function. Mr. Henderson expressly stated that he proceeded on this broad assumption (R. 350), and respondents' other expert witnesses in *Household*, Schmus and Dreibelbis, agreed generally with his testimony without indicating any different or more limited concept of the "service" category which they applied to the business of making loans (R. 145, 156)—as did Dr. Neifeld, also, when he testified in the instant case (R. 58). These witnesses, however, had considerable difficulty in describing a loan transaction as a "sale" of services. See *infra*, pp. 46–47.

333–334); that none of the standard authorities or trade publications recognize the "financial institutions * * * as being in the field of Marketing" or "as being properly a part of marketing or of retailing" (R. 343–344); and that the concept of marketing or selling relates to the transfer or use of commodities or of something the purchaser consumes—"money we do not regard as a commodity" or "something you can consume" as one can consume commodities or barber shop, beauty shop or restaurant "services" (R. 347). This testimony was corroborated by reference to the "Standard Industrial Classification Manual," a Government classification developed by a committee of experts so as to "conform to the structure of American industry and to general usage, to the attitudes of businessmen and government administrators in the field", which excluded financial institutions from its "service" classifications and placed them in the wholly separate category of "finance, insurance and real estate," and "[t]here is no designation of wholesale or retail within that" (R. 333–335).[7]

The Government's witnesses testified that the retail-

[7] Respondents' witnesses would classify all businesses which they regard as performing services in the broad generic sense (whether within the "finance, insurance and real estate" category or some other category) to be "retail" when their "services" are for consumer use. See Mr. Henderson's testimony that telephone companies, "personal transportation" services (presumably taxicabs, airport limousines, railway passenger service, air passenger service, trolleys and bus companies), public utility companies, and insurance companies all perform retail services (R. 350–351). See also Dr. Neifeld's testimony that commercial banks and insurance companies also engage in retail operations (R. 48–50).

wholesale concept "is simply not relevant to the field of finance" (R. 337). It applies to the mercantile field, and, as Household's own literature recognizes, "Merchandising and banking are two distinct businesses" (Ex. D–5 (k), R. 275, at 301). As to the use of the terms "retail" and "wholesale" with respect to the financing field, the Government's witnesses stated these terms were not so used in the "traditional" or "official" sense, but only by way of rough analogy, *e.g.*, as a "useful" or "expository, pedagogic" substitute for "large" and "small", as "one might also speak of the wholesale loss of life in an earthquake, wholesale damage done by the recent storm" (R. 164–165, 168), or as "a figure of speech" in "illustrating or talking about a particular problem within the industry and not in the sense that the general public or the general business community would understand the word" (R. 341); or to illustrate that the small loan business "has certain problems which are analogous to those of the grocery store * * *. But that is a very different thing from jumping to the conclusion that the small loan company is a retailing establishment in the same sense that a grocery store or any other retail establishment is" (R. 338).

The distinction "between what is recognized traditionally, generally and officially—officially as shown by these classifications and the documents we have heard about, and popularly as well—to be retailing, and that which is perhaps capable of being construed ultimately or theoretically or in some supplementary or additional way as retailing" (R. 168), was

emphasized at several points (R. 162, 163, 164, 168). As one Government witness pointed out, the usage of the terms "wholesaling" and "retailing" in connection with financing "was obviously so untraditional * * * and unusual" that particular attention had to be called to such usage by qualifying clauses. (R. 162). Thus, in the literature relied upon by respondents, the terms were used in such qualified fashion as in *Household's* Ex. D–2 where it is said "[*i*]*n one sense of the word,* banks are wholesalers of credit, and companies engaged in making installment consumer loans are retailers of credit" (R. 162; emphasis added). Similarly, in an article published in the Journal of Business, the reference "[*i*]*n the last analysis* the specialized financial agency making small loans is doing a retail business" (R. 163; emphasis added).

Much of the evidence of respondents' witnesses Neifeld and Henderson confirms this very specialized analogous usage. Although Dr. Neifeld disclaimed that the terms "retail" and "wholesale" are used in the small loan business in an analogous sense, his explanation of the usage of such terminology by writers in the field was that "they generally do, *especially when they are trying to justify, or explain rather is the word, why these small loans have to have a higher rate*" (R. 58; emphasis added). That this is the reason the terms are used by the industry is clear from the literature in which they appear. See this material, most of which consists of institutional advertisements (R. 235–321; R. 126–137). And Mr. Henderson testified that, in his work with the Russell

Sage Foundation, the "principal thing" that brought forward the idea of comparing small loan companies to retailers "was the discussion (if that is a strong enough word) of the need for a higher than the banking rate or the established usury law rate in the state"—*i. e.*, it was part of the "argument" or "fortification" (R. 348–349). Mr. Henderson also stated that "[a]nother distinguishing feature [between the banks and small loan companies] is the fact that the banks are really manufacturers of credit and sellers on a wholesale base, *if you want to push the analogy*" (R. 222; emphasis added).

As to the term "credit companies," the Government's witnesses testified that personal loan or finance companies are just as much credit companies "as is any other business that deals primarily in credit" (R. 168). Their testimony was corroborated by respondents' own witness. While Dr. Neifeld stated that he had some difficulty with the term because "there is a specialized group known as commercial credit companies," he readily agreed, when the question was rephrased by substituting "institutions" for "companies," that the term would include personal loan companies (R. 64–65).[8]

5. The District Court below concluded that "[t]he burden rests on the party asserting any exemption to establish that all requirements for the exemption

[8] When this same witness testified in *Aetna Finance Co.* v. *Mitchell*, 247 F. 2d 190 (C. A. 1), he stated that any financial institution "that furnishes credit as a service is a credit institution," including sales finance companies and personal finance companies. "*They are all credit companies*" (*Aetna* Record, p. 43; emphasis added).

have been met" (R. 83), and that "[t]he lending of money does not constitute the sale of either goods or services within the intendment of the Section 13 (a) (2) exemption" (R. 84). In view of these conclusions, the trial court found it unnecessary to decide whether the discount phase of respondents' business would be sufficient to defeat the exemption (*ibid.*). Although it found that "local offices of small loan companies are regarded in the financial industry as retail service establishments," this finding was qualified by the preface: "Subject to the same qualifications expressed by Chief Judge Kirkpatrick in *Tobin* v. *Household Finance Corp.*, 106 F. Supp. 541 (D. C. E. D. Pa.), and Judge Day in *Mitchell* v. *Aetna Finance Company*, 144 F. Supp. 528 (D. C. R. I.)" (*id.*, p. 83). These "qualifications," as Judge Kirkpatrick had explained, are that the expressions "service" and "retail" in the financial industry (in contrast to their usage in the "mercantile field") reflect simply the "very broad generic sense" and "overworked" usage of the terms, not "anything more than an analogy borrowed from the mercantile field * * *" having no relevance in the context of the Section 13 (a) (2) exemption (106 F. Supp. at 544–545).

The Court of Appeals, with Judge Miller dissenting, reversed. The majority opinion stated that the "language of the '49 Amendment is clear and unambiguous," that it used terms which had been previously defined in the broad statutory definitions, and "[w]hile some of the legislative history of the amendment may suggest another purpose in deroga-

tion of the plain language of the amendment, such assumed purpose need not control" (R. 360); it placed main reliance on the Fifth Circuit's opinion in *Mitchell* v. *T. F. Taylor Fertilizer Works*, 233 F. 2d 284 (R. 359). Circuit Judge Miller dissented (R. 361) "in view of the legislative history of the 1949 Amendment" citing the *Household Finance* and *Aetna Finance* decisions, *supra*, pp. 4–5.

SUMMARY OF ARGUMENT

A. The decision of the court below is premised upon the fallacious assumption that the "clear and unambiguous" statutory language of Section 13 (a) (2) of the Fair Labor Standards Act, as amended in 1949, so plainly applies to any and every establishment engaged in the "sales of goods or services", in the broadest generic sense of those terms, that resort to the legislative history to determine the meaning and intent of the amendatory language is unnecessary and unwarranted. Even if the statutory language conveyed such a "clear and unambiguous" meaning as the court below assumed, it is now too well-settled for argument that "the so-called 'plain meaning rule'" does not justify disregarding "explanatory legislative history no matter how 'clear the words may appear on superficial examination'" (*Harrison* v. *Northern Trust Co.*, 317 U. S. 476, 479; *Employees* v. *Westinghouse E. Corp.*, 348 U. S. 437, 444). In this case, the legislative history is controlling.

1. In the first place, the sponsors of the 1949 amendment explicitly asserted the legislative intent to "do

nothing to change" the previous "nonexempt status" of establishments such as "banks, insurance companies, *credit companies,* newspapers, telephone companies, gas and electric utility companies, telegraph companies, etc." (95 Cong. Rec. 12505–12506, 14877, 14932; emphasis added). The mention of "*credit companies*" plainly has reference to personal finance or small loan companies ("whose sole function, in fact, is to lend money on credit," as the First Circuit noted in *Aetna Finance Co.* v. *Mitchell,* 247 F. 2d 190, 193 (C. A. 1)), as much as any other kind of credit company. Respondents' suggestion that the term "credit companies" refers only to "commercial" or "business" loan companies is, as the First Circuit ruled, "quite unconvincing" (*Aetna,* 247 F. 2d at 193), and is contradicted by the admission of respondents' own witness as well as by the frequency with which small loan companies describe themselves as "credit companies."

2. The sweeping assumption by the court below that the amended Section 13 (a) (2) completely changed and expanded the basic scope of the original exemption is not only directly contradicted by the above expressions of intent to leave unchanged the non-exempt status of the specified categories of businesses, but is clearly refuted by the rest of the legislative history. The repeated and emphatic general disavowals of any such expansive intent were amplified by specific explanations and illustrations confirming, beyond doubt, the purpose to limit the exemption to the basic types of establishments classified as typical "retail or service establishments" in the administrative and judicial interpretations prior to the 1949 amendment—estab-

lishments selling merchandise "epitomized by the corner grocery, the drug store and the department store * * *" (*Phillips Co.* v. *Walling*, 324 U. S. 490 at 497) and comparable service trades akin to these typical retail establishments except that they sell services instead of merchandise, such as "restaurants, barbershops, beautyparlors, funeral homes [and] shoe repair shops." See *Aetna, supra*, 247 F. 2d at 192; Administrative Interpretative Bulletin No. 6, 1942 WH Manual 326, par. 24.

Our understanding of the history is, we believe, confirmed by this Court's decision in *Mitchell* v. *Bekins Van & Storage Co.*, 352 U.S. 1027, rejecting a claim to this exemption which rested on the same broad (but erroneous) assumption of the expansive effect of the 1949 amendment.

3. As uniformly explained in the legislative reports and by the sponsors, the limited purpose of the amendment, and the "only" substantial change intended, was to meet the problem "of the establishments which had previously been commonly recognized as retail" and were "traditionally regarded as retail," whose exempt status was "doubtful under the present exemption" by reason of the administrative application of the "business use" test in determining whether such establishments exceeded the "25 percent tolerance of nonretail activities" (95 Cong. Rec. 11003, 11116, 12492–12499, 12508).[9] The principal

[9] The "consumer-use" or "business-use" test has reference to the standard adopted by administrative interpretation, and approved by this Court in *Roland Electrical Co.* v. *Walling*, 326 U.S. 657, to distinguish typical retail sales from wholesale and other "non-retail" sales. The pre-1949 administrative interpretation pointed out that the type of establishment to which

sponsors in both Houses (Representative Lucas and Senator Holland) repeatedly assured the legislators: "It is *only* in the sense that it clarifies *such doubt* that my amendment can be regarded as expanding the present exemption" (95 Cong. Rec. 11116, 12506; emphasis added). As stated by Senator Holland, "that is the real milk in the coconut in our particular amendment," and is the "only substantial difference between the Administrator and his recommendation and the amendment which we propose * * *" (95 Cong. Rec. 12492–93, 12498, 12508).

This "doubt" had arisen only with respect to establishments in the marketing and distributing field and the comparable service trades—*i. e.*, the field in which the retail-wholesale concept was usually and commonly (as well as in official and economic usage) associated—

---

the exemption was limited "[t]ypically * * * sells 'consumer' goods * * * to private persons to satisfy their personal wants," whereas it is "characteristic of wholesale establishments to exclude the general consuming public * * * and to confine their sales to other wholesalers, retailers, and large-scale industrial or business purchasers." Interpretative Bulletin No. 6, 1942 WH Man. 326, 329–330, pars. 11, 14. But, taking cognizance of the fact that an establishment with "the principal attributes of a retail [or service] establishment for purposes of section 13 (a)(2)" not infrequently "makes some nonretail sales," the administrative interpretation provided that "[m]inor discrepancies * * * will not defeat the exemption" and that such an establishment "nevertheless would be considered a retail establishment if the gross receipts from nonretail sales are not substantial in relation to the total gross receipts of the establishment," and that "[f]or purposes of enforcement the Administrator will ordinarily consider the nonretail selling of an establishment to be substantial if the gross receipts from such selling constitute more than one-quarter (25 percent) of the total gross receipts of the establishment." *Id.* at 331, 334, pars. 18, 28.

as distinguished from the separately classified fields of manufacturing, finance, real estate, public utilities etc. That the "doubt" was limited to the former narrow field is evident from the sponsors' explanations and specific illustrations of the problems for which the proposed amendment was designed (95 Cong. Rec. 12492–93, 12506; *Actna* Appx. 32–33, 73). There was no suggestion of any need for modification of the then existing administrative and judicial interpretations that this particular exemption was wholly inapplicable in the latter fields. On the contrary, not only was there repeated explicit approval of their exclusion from this exemption, but an express separate amendment was deemed necessary in order to grant an exemption to "retail" establishments engaged in manufacturing or processing some of the goods sold on the premises. Section 13 (a) (4). (See *infra*, pp. 33–34, fn. 23).

B. The statutory language of the amended exemption, far from plainly supporting the majority decision below, is on its face inapposite to the loan and discount business. The language "sales of goods or services" and an "annual dollar volume of sales" is certainly not descriptive of the business of lending money and discount purchasing of accounts receivable, without distorting the ordinary, commonly understood, meaning of those terms. Not even respondents themselves have espoused the position, taken by the court below, that this exemption provision must be read as incorporating the broad statutory definition of "goods" which was included in the original Act (obviously with reference to the coverage provisions then

in the Act). To so read the language of the amended exemption is not only "to pervert the process of interpretation by mechanically applying definitions in unintended contexts" (see *Farmers Irrigation Co.* v. *McComb*, 337 U. S. 755 at 764), but would be self-defeating so far as respondents' loan and discount business is concerned.

The patent confusion and unrealities encountered in any attempt to apply the statutory language to the loan business confirms the conclusion reached by all of the other courts that "the fact is that there are certain types of transactions which simply cannot be fitted" into the statutory language and that any attempt to do so simply "creates an anomaly" (see Judge Kirkpatrick in *Household*, 106 F. Supp. at 547). The answer is that, here, as in *Farmers Irrigation, supra*, "the legislative history confirms what a natural reading of the language of the * * * exemption would indicate," *viz.*, that the amended exemption used the terms "sales of goods or services" and "annual dollar volume of sales" in the same natural sense as they had been used in the administrative interpretation of the original exemption.

C. In any event, the trial court's conclusion that respondents failed "to establish that all requirements for the exemption have been met" (R. 83) undoubtedly reflects its appraisal of the conflicting "expert" evidence in this record. Since the exemption by its express terms presupposes that the establishment is engaged in making "sales of goods or of services (or of both)," a failure to prove this basic condition would alone be sufficient to support the trial court's

decision. The evidence of the Government's and respondents' expert witnesses was conflicting with respect to this basic condition as well as on the "industry recognition" issue posed by the last portion of the exemption (*supra*, p. 4 *ff.*; *infra*, pp. 50–54). The trial court's conclusion, therefore, that "the lending of money does not constitute the sale of either goods or services within the intendment of Section 13 (a) (2) exemption" (R. 84), although not labeled a "finding of fact," clearly represents the court's resolution of the conflicting expert evidence.

Moreover, the legislative history clearly establishes the inadequacy of the type of self-generated and self-serving evidence adduced by respondents, and specifically contradicts the Sixth Circuit's apparent assumption that "recognition *by* the industry itself" (R. 360, emphasis added) would suffice to satisfy the "industry recognition" test. As pointed out by the First Circuit in *Aetna*, "the sponsors of the amendatory legislation repeatedly disavowed an intention to permit each industry to decide for itself whether it was conducting a 'retail or service establishment' within the meaning of the exemption" (247 F. 2d at 193).

Since virtually all of respondents' evidence relating to the "industry recognition" test was of this self-serving nature, and was contradicted not only by the administrative interpretation and judgment but also by objective well qualified experts and by standard Government reports and publications, the trial court below (and all of the other trial courts in similar cases) clearly evaluated this evidence correctly and according to the standards intended by Congress.

Certainly, at the very least, this appraisal of the evidence was not so clearly erroneous as to warrant reversal on appeal. On the contrary, we submit that the standard by which the Sixth Circuit appraised the evidence, ignoring the legislative intent, was clearly erroneous.

ARGUMENT

RESPONDENTS' LOAN AND DISCOUNT OFFICE IS NOT A "RETAIL OR SERVICE ESTABLISHMENT" WITHIN THE MEANING OF SECTION 13 (a) (2) OF THE FAIR LABOR STANDARDS ACT, AS AMENDED IN 1949

Introduction

The decision below rests on the premise that Congress, in enacting the 1949 amendments to Section 13 (a) (2), *supra*, p. 2, abandoned the previous well-settled interpretation that the term "retail or service establishment" did not encompass every establishment engaged in selling goods or performing services in the broad generic sense, but was restricted to "small local retail establishments, epitomized by the corner grocery, the drug store and the department store" (*Phillips Co.* v. *Walling*, 324 U. S. 490, 497) and the type of "service" establishment "which has the ordinary characteristics of a retail establishment except that it sells services instead of goods" (*Fleming* v. *A. B. Kirschbaum Co.*, 124 F. 2d 567, 572 (C. A. 3), affirmed, 316 U. S. 517), "comparable to 'barber shops, beauty parlors, shoe-shining parlors, clothes pressing clubs, laundries, automobile repair shops', or the like" (*Sun Publishing Co.* v. *Walling*, 140 F. 2d 445,

448 (C. A. 6), certiorari denied, 322 U. S. 728).[10] Ac-

[10] It was well settled prior to the 1949 amendments that eligibility for the exemption as originally enacted (which simply read "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce", App., *infra*, p. 58, fn. 1) was restricted to the types of establishments as designated in the administrative interpretation. As noted in the First Circuit's *Aetna* opinion, 247 F. 2d 190, the consistent administrative interpretation had justifiably restricted this exemption to "service establishments deemed to be akin to retail establishments," such as "restaurants, barbershops, beauty parlors, funeral homes, shoe repair shops," etc. whose "revenue is derived primarily from the sale of service instead of from the sale of merchandise" (see 247 F. 2d at 192), and that many dissimilar classes of establishments, although engaged in "service" in the "broad sense [that] every business performs service" were not within the contemplation of the term "retail or service establishment" as used in this exemption, listing among these non-exempt classes "banks * * * trust companies; building and loan associations; personal loan companies; insurance companies * * * newspapers; telephone companies; * * * electric and gas utilities; * * *" (Interpretative Bulletin No. 6, 1942 WH Manual 326, pars. 24–31; *Aetna* Appx. 3–6).

This restrictive interpretation received early and consistent judicial confirmation. See *Phillips Co.* v. *Walling*, *supra*, at 497; *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, affirming *Fleming* v. *Arsenal Building Corp.*, 125 F. 2d 278 (C. A. 2), and *Fleming* v. *A. B. Kirschbaum Co.*, 124 F. 2d 567 (C. A. 3), adopting the administrative interpretation that "service establishment" as used in the exemption is limited to the type of establishment "which has the ordinary characteristics of a retail establishment except that it sells services instead of goods" (124 F. 2d at 572); *Roland Electrical Co.* v. *Walling*, 326 U. S. 657, 666, ruling that the term "service establishment" was not to be "read in a detached and broad sense" but as reaching "only such retail or service establishments as are comparable to the local merchant, corner grocer or filling station operator * * *;" *Sun Publishing Co.* v. *Walling*, *supra*, where the Court of Appeals which decided the instant case, after noting that in

cording to this reasoning, the 1949 amendments so changed and expanded the basic concept of "retail or service establishment," as used in the original exemption, that any and every kind of business establishment, even those engaged in enterprises such as finance, insurance, utilities, newspapers, etc., theretofore held outside the scope of and ineligible for the exemption, may now qualify through application of the percentage and "industry recognition" tests.

This broad interpretation of the amended exemption, as the court below itself seems to have recognized,[11] could be reached only by ignoring the "very legislative materials" which "refute [its] assumption." See *United States* v. *Dickerson*, 310 U. S. 554 at 562. Even if the statutory language conveyed such a "clear and unambiguous" meaning as the court below assumed (which, we submit, is far from clear, see *infra*, pp. 45–48), "the so-called 'plain meaning rule'" does not justify disregarding "explanatory legislative history no matter how 'clear the words may appear on superficial examination'." (*Harrison* v. *Northern Trust Co.*, 317 U. S. 476, 479; *United States* v. *American Trucking Ass'ns.*, 310 U. S. 534, 543–544; *United States* v. *Dickerson*, 310 U. S. 554, 562; *Boston*

"the broader sense, every business is of service to the public," ruled that "as the term 'service' is used in the Act" it was limited as quoted in the text, *supra*. To the same effect, see *Schmidt* v. *Peoples Telephone Union of Maryville, Mo.*, 138 F. 2d 13 (C. A. 8); *Reynolds* v. *Salt River Valley Water Users Assn.*, 143 F. 2d 863 (C. A. 9).

[11] See the opinion below, R. 360: "While some of the legislative history of the amendment may suggest another purpose in derogation of the plain language of the amendment, such assumed purpose need not control."

Sand Co. v. *United States*, 278 U. S. 41, 48; *Employees* v. *Westinghouse Corp.*, 348 U. S. 437, 444). In construing the Fair Labor Standards Act, and specifically the exemption here in issue, this Court has repeatedly relied upon the legislative history. *Mitchell* v. *Bekins Van & Storage Co.*, 352 U. S. 1027; *Phillips Co.* v. *Walling*, 324 U. S. 490; see also *Steiner* v. *Mitchell*, 350 U. S. 247.[12]

That the pertinent legislative history here does not merely "suggest" (see opinion below, R. 360), but plainly discloses, a contrary and much more limited meaning than that assumed by the court, is impressively evidenced by the marked unanimity of judicial opinion when that legislative history has been considered. Thus, the unanimous Court of Appeals for the First Circuit and the District Court in *Aetna Finance Co.* v. *Mitchell*, 247 F. 2d 190 (C. A. 1), affirming, 144 F. Supp. 528 (D. R. I.), as well as the dissenting appellate judge and the District Court in the instant case (R. 82–84, 361), and the District Court in *Tobin* v. *Household Finance Corp.*, 106 F. Supp. 541 (E. D. Penn.),[13] all, upon examination of

[12] The Sixth Circuit itself in its *Steiner* opinion recognized the appropriateness of "resort to the legislative history," quoting specifically this Court's statement [in *United States* v. *American Trucking Assn's.*, *supra*] that "there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination'" (215 F. 2d 171 at 173).

[13] Reversed on other grounds *sub nom. Mitchell* v. *Household Finance Corp.*, 208 F. 2d 667 (C. A. 3). The reversal was on the grounds that employees of the branch loan office there involved were not engaged in commerce within the meaning of the Act which made it "unnecessary to go into the question

the legislative history, reached a conclusion contrary to the decision below.

We shall show (A) that the legislative history unequivocally refutes the Sixth Circuit's interpretation of the 1949 amendatory language, (B) that the statutory language itself is inapposite to the loan and discount business and that, at the least, the applicability of the language is sufficiently doubtful to warrant reliance on the explanatory legislative history; and further (C) that, even if the statutory language could reasonably be construed as extending eligibility for exemption to loan companies, respondents' evidence falls short of proving that respondents' establishment meets the specified conditions for exemption.

A. THE LEGISLATIVE HISTORY REFUTES THE SIXTH CIRCUIT'S INTERPRETATION OF THE AMENDED EXEMPTION [14]

As pointed out by the First Circuit in *Aetna* (247 F. 2d at 192–193), the legislative background and history of the amended exemption, far from indicating any intent to expand the basic categories of the eligible businesses, (1) "made it explicitly clear that

---

whether defendant is within the 'retail or service' exception to the statute" (208 F. 2d at 672). In the instant case, it was conceded that the employees are engaged in interstate commerce and therefore within the Act's coverage unless exempted by Section 13 (a) (2) (R. 17–18).

[14] For purposes of convenience, the substance of the legislative history, which is quite voluminous, was compiled in a Supplemental Appendix to the Brief of the Secretary of Labor in the First Circuit *Aetna* case, *supra*, which was also submitted as an appendix to the Secretary's brief in the court below in the instant case; copies have been filed with the Clerk of this Court. References to this Appendix are cited as "*Aetna* Appx."

the proposed amendment would do nothing to change the non-exempt status" of the categories (including specifically loan and credit companies) previously classified by administrative and judicial interpretation as ineligible for the exemption, and (2) "unmistakably disclose" the much more limited intent, which was simply to relax the so-called "consumer-use test" [15] so that the kinds of establishments theretofore recognized (and administratively classified) as eligible for the exemption, as originally enacted, might be allowed more leeway for "non-retail sales" without losing the exemption by reason of the administrative 25% "non-retail selling" tolerance standard. In short, the legislative history discloses that the amendment was intended essentially to codify the previous administrative interpretation except for its application of the 25% tolerance standard.

1. *The Legislative Purpose To Do Nothing To Change The Previous Non-exempt Status of "Credit Companies" Was Explicitly And Repeatedly Stated*

Unequivocal, and we submit decisive, evidence of legislative intent with respect to the precise issue here presented is the explicit statement repeatedly made in the legislative reports and by the sponsors of the amendment that "the amendment does not exempt banks, insurance companies, building and

[15] On the "consumer-use test" and the "25 percent tolerance standard", see footnote 9, *supra*, pp. 15–16. See also *Interpretative Bulletin* No. 6, as revised and reissued June 16, 1941 (1942 W. H. Man. 326), pars. 28 and 29; *Aetna* Appx. 4–5).

loan associations, *credit companies,* newspapers, telephone companies, gas and electric utility companies, telegraph companies, etc." (see House Managers Statement, 95 Cong. Rec. 14932, emphasis added; quoted in *Aetna* Appx. 8).

The report of the Majority of the Senate Conferees made virtually the same statement:

> The conference agreement exempts establishments which are traditionally regarded as retail. * * * establishments which do not now have the exemption because the selling or servicing in which they are engaged is not considered to be retail (such as banks, insurance companies, credit companies, newspapers, telephone companies, gas and electric utility companies, telegraph companies, etc.) will not become retail or service establishments under the provisions of the conference agreement. [95 Cong. Rec. 14877; quoted in *Aetna* Appx. 10].

Again, when the specific question was raised on the floor of the Senate whether the proposed amendment would have the effect "of exempting banks, insurance companies, credit companies, * * * etc.," Senator Holland, the main sponsor of the amendment in the Senate, answered with an unqualified "No," pointing out that *"these types of businesses are not considered exempt under the retail or service establishment exemption in the present law"* and that *"the proposed amendment would do nothing to change their non-exempt status"* (95 Cong. Rec. 12505–12506; *Aetna* Appx. 70–71; emphasis added).

Respondents have attempted to escape this clear

expression of legislative intent by suggesting that Congress did not use the term "credit companies" in its broad sense but in some esoteric sense which would not include personal finance companies (see the Statement, *supra*, p. 11). The First Circuit's dismissal of this suggestion as "quite unconvincing" (*Aetna*, 247 F. 2d at 193) is amply sustained by the admission of respondents' own witness that personal loan companies are "credit institutions" (see the Statement, *supra*, p. 11), as well as by the frequency with which small loan companies describe themselves as "credit companies." Thus, in the latest annual Roster of Consumer Finance Companies in the United States, at least 359 such establishments describe themselves in their trade names as "credit companies."[16] It may also be noted that the company which writes protective life insurance on Kentucky's Finance's borrowers calls itself the *Credit* Life Insurance *Company*.[17]

---

[16] This roster is published by the National Consumer Finance Association (the trade association of which Kentucky Finance is a member) from information supplied by the State supervising officials operating under the Uniform Small Loan Laws.

[17] Even the restricted usage which loan company witnesses claimed for the term "credit companies" (*viz.*, "commercial" credit companies making "credit or loans available to business establishments," "purchas[ing] accounts receivable," etc., R. 141, 149) would clearly include the discount phase of respondents' business which consists of buying installment sales contracts. The purchasing of such accounts receivable constitutes 40 percent of respondents' total business. Therefore, regardless of whether personal loan companies are also "credit companies," the exemption would be inapplicable to respondents' business (see the further discussion in text, *infra*, pp. 54–55).

2. *The Broad Assumption That The 1949 Amendment Changed and Expanded the Basic Types of Establishments to Which the Exemption Had Previously Been Restricted Is Also Contradicted by the Legislative History*

The premise of the decision below is that the 1949 amendment had the effect of making any and all businesses—including banks, insurance companies, newspapers, public utilities, as well as credit companies—eligible for this exemption. This is, also, the basic premise of respondents' claim to the exemption. As respondents' principal witness frankly explained, the classification of loan companies as "retail or service" establishments depends on the theory that *all* economic endeavor constitutes either the sale of goods or services—he "couldn't recall anything that was not goods or service," or (as clarified by counsel) "in the economy of this country you can have transactions in either goods or service or nothing else" (R. 213–214)—and "from that standpoint," "the public utility company * * * insurance companies, banks and so on," as well as credit companies are "selling services" (R. 213–214, 219, 350–351).[18] Respondents' witnesses also

[18] It may be noted that respondents have not taken the position of the court below that lending money constitutes the "selling" of "goods"—i. e., "disposition" of "articles or subjects of commerce" within the literal terms of the Act's "own lexicon" (see Point B, *infra*, pp. 45–48 for discussion of this ruling). The express stipulation in the *Household* case that the small loan company is *not* engaged in the sale of "goods" (R. 352) apparently recognized that the terms of this exemption were used in their more natural, ordinary sense. Cf. *Farmers Irrigation Co.* v. *McComb*, 337 U. S. 755, 764, discussed *infra*, pp. 45–48.

admitted that the standard on which they relied to classify loans as "retail"—viz. "making loans to the individual or the family to meet consumer needs" as distinguished from "making loans to business or industry for business purposes" (R. 124–125)—would apply equally to classifying telephone service (to individuals), personal transportation service, residential gas and electric service, and sales of insurance policies to individuals, as "retail" service (R. 350–351).

In other words, respondents' claim to exemption and the decision below are premised on the sweeping assumption that the 1949 amendments enacted an "entirely new and controlling" definition of "retail or service establishment" (see respondents' brief below, p. 24) which would make every establishment within the Act's general coverage eligible to claim the exemption. This would impose on the Administrator and the courts the burdensome and complicated task of applying the new "industry recognition" test of the exemption (*supra*, pp. 2, 4, 22) not only to the numerous establishments in the various classes previously recognized as eligible but to establishments in the wide variety of business categories to which the term "retail or service establishment" had theretofore been considered wholly inapplicable (see *supra*, p. 21, fn. 10). According to this reasoning, no kind of business establishment can be excluded from the exemption without such an extensive inquiry.[19]

[19] The record in this case well illustrates how burdensome and expensive this task is, involving unavoidably a "battle of the experts".

This broad, unlimited, interpretation of the 1949 amendment is not only directly contradicted by the above-quoted explicit expressions of intent to leave unchanged the non-exempt status of specified categories of business (*supra*, pp. 25–26), but is refuted by other observations about the amendment in the legislative reports and during the extensive debates. The principal sponsors in both Houses (Representative Lucas and Senator Holland) repeatedly and emphatically asserted that the amended exemption was limited to "establishments which are traditionally regarded as retail" and "which had previously been commonly recognized as retail" (e. g. 95 Cong. Rec. 11116, 12499, 12506, 14877; *Aetna* Appx. 10, 22, 51, 73), and "in a real sense it is not expanding the exemption at all but simply confirming it for those establishments which the Congress always intended to exempt" (95 Cong. Rec. 11116, 12506; *Aetna* Appx. 23, 73). These general assertions and disavowals were amplified by specific illustrations and explanations confirming that the basic types of establishments with which the amended exemption was concerned were the same as those previously classified as "typical examples" of "retail or service establishments" by the prior administrative and judicial interpretations, and that there was no intent to make the exemption available to whole new categories of businesses.

Every reference to the types of establishments regarded as affected by the amended exemption (and the legislative reports and debates are replete with

references [20]) invariably mentioned only businesses in the same classifications as the "typical examples" contained in the administrative interpretation prior to the 1949 amendments and in this Court's opinion in *Phillips Co.* v. *Walling*, 324 U. S. 490—establishments selling merchandise "epitomized by the corner grocery, the drug store and the department store * * *" (324 U. S. at 497) and comparable service trades akin to these typical retail establishments except that they sell services instead of merchandise, such as restaurants, hotels, garages, barber shops, beauty parlors and funeral homes. See *supra*, pp. 15–16, 20–22, and Administrative Interpretative Bulletin No. 6, *supra*, p. 21, fn. 10. Compare the types of establishments named by the sponsors as those to which their amendment would apply: "the grocery stores, the hardware stores, the clothing stores, the dry goods stores, restaurants, hotels, stationery stores, farm-implement dealers, automobile dealers, coal dealers, paint stores, furniture stores, and lumber dealers" (95 Cong. Rec. A5231–32, 11003–11004, 11199, 11203, 12502; *Aetna* Appx. 12–13, 16, 20–21, 24–27, 63). And contrast the explicit acceptance of the non-exempt classification of "banks, insurance companies, credit companies, newspapers, telephone companies, gas and electric utility companies, telegraph companies, etc." (*supra*, pp. 25–26), which obviously paraphrased the substance of the prior administrative in-

[20] See e. g., 95 Cong. Rec. A5231–32, 11001, 11003–4, 12499, 12502–03, 12505, 12515; *Aetna* Appx. 8, 13, 14, 20, 53, 63, 65, 66, 72, 95.

terpretation (see Interpretative Bulletin, par. 29; *Aetna* Appx. 4).[21]

While the sponsors criticised extensively the administrative and judicial application of the so-called "business-use" test (see footnote 9, *supra*, pp. 15–16) to typical establishments "traditionally regarded as retail," the legislative history is devoid of any criticism of the basic classifications of eligible and ineligible businesses contained in these prior administrative and judicial interpretations. On the contrary, every reference to these classifications paraphrased the substance of the prior administrative interpretation and evidenced full acceptance of this aspect of the prior rulings.[22]

---

[21] See also the explicit approval of this Court's rulings that the exemption was inapplicable to the businesses involved in the *Kirschbaum* and *Roland Electrical* cases, *infra*, pp. 41–42.

[22] Moreover, since the Administrator's interpretations in this respect were not changed, Section 16 (c) of the 1949 amending Act itself ratified the non-exempt status of the "personal loan companies," *inter alia*. Section 16 (c) expressly provided that "Any order, regulation or *interpretation* of the Administrator * * * in effect under the provisions of the Fair Labor Standards Act of 1938, as amended, on the effective date of this Act, *shall remain in effect* * * * except to the extent that any such order, regulation, interpretation * * * may be inconsistent with the provisions of this Act * * *." (Emphasis added.) The administrative interpretation specifically listing "personal loan companies" among the types of establishments not considered eligible for the exemption [Interpretative Bulletin, "Retail and Service Establishment and Related Exemptions," 1942 W. H. Man. 334–335; 1944–45 W. H. Man. 454; later incorporated in 29 C. F. R. 1958 Supp., 779.19] was unquestionably "in effect * * * on the effective date of this [1949] Act." See *Steiner* v. *Mitchell*, 350 U. S. 247, 255; *Mañeja* v. *Waialua Agricultural Co.*, 349 U. S. 254; *Allstate Construction Co.* v. *Durkin*, 345 U. S. 13, 16–17.

It follows that, in the absence of any evidence that Congress

This legislative history is, we believe, confirmed by this Court's decision in *Mitchell* v. *Bekins Van & Storage Co.*, 352 U. S. 1027. While *Bekins* did not deal with the precise aspect of the amended exemption involved in this case, respondent's contention there (that five separate warehouses could be regarded as a single establishment for purposes of applying the tests of the amended exemption) rested, as here, on the broad assumption that the amended Section 13 (a) (2) had completely changed and expanded the basic scope of the original exemption. In rejecting Bekins' contentions, this Court, in its brief *per curiam* opinion, relied upon the pre-1949 decision in *Phillips Co.* v. *Walling, supra*, and referred to the specific parts of the legislative history (95 Cong. Rec. 12579) which plainly demonstrate the error of the broad assumption made by the respondent in *Bekins* and the court below in the instant case.[23]

---

intended to change the administrative interpretation on the inapplicability of the retail establishment exemption to personal loan companies, that interpretation remains in effect by express legislative mandate.

[23] The same broad assumption was at the bottom of the Fifth Circuit's erroneous decision in *Mitchell* v. *T. F. Taylor Fertilizer Works, Inc.*, 233 F. 2d 284. *Taylor* involved the Section 13 (a) (4) exemption, newly added by the 1949 amendments (see App., *infra*, pp. 58–59), which, by express terms, extends the 13 (a) (2) exemption to "an establishment which qualifies as an exempt retail establishment under clause (2) * * * notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells * * *." It may be noted that this special provision, which as its sponsors (Senator George and Representative Lucas) explained, was limited to the "small retailers, who are strictly retailers" but who produce or process some of the products which they sell, and was not intended to permit "manufacturing establishments, as such" to qualify for

3. *The Limited Purpose of the Amendment, and its Only Substantial Change, Was a Clarification of the Doubt Arising Out of the Application of the "Consumers-Use" Test To Disqualify, Under the 25 Percent Non-Retail Tolerance Standard, the Types of Establishments Traditionally Regarded As Retail*

As uniformly explained in the legislative reports and by the sponsors, the "only" substantial change intended by the 1949 amendment was to meet the problem "of the establishments which had previously been commonly recognized as retail" and were "traditionally regarded as retail," whose exempt status was

---

the exemption (95 Cong. Rec. 11216, 12579; see also *id.* 14942) would not have been needed if the terms of Section 13 (a) (2) had been used in the broad generic sense assumed by the court below and by respondents in the instant case, since the producing or processing operations would not have prevented such "retailers" from qualifying under Section 13 (a) (2), if thus broadly construed.

As pointed out in our petition for certiorari in the present case (pp. 13–14), although the *Taylor Fertilizer* decision was believed to be clearly erroneous, no petition for certiorari was filed because the peculiar nature of the fertilizer business and the special character of Taylor's operations were not thought to be sufficiently representative of the general problem presented by the new Section 13 (a) (4), the applicability of which depends upon whether the establishment claiming it is a "retail or service establishment" within the meaning of Section 13 (a) (2). Also, it was thought that this Court's decision in *Boekins* might serve to resolve any problems arising from the erroneous *Taylor* opinion. However, not only has the Fifth Circuit adhered to and extended the basic rationale of *Taylor* (*Ben Kanowsky, Inc.* v. *Arnold*, 250 F. 2d 47, modified, 252 F. 2d 787, pending on petition for certiorari, No. 32 Misc., this Term) (in which the Government has filed a supporting brief), but *Taylor's* far-reaching implications have been affirmed and exemplified by the Sixth Circuit's decision in the instant case.

"doubtful under the present exemption" by reason of the administrative application of the "business use" test (see footnote 9, *supra*, p. 15) in determining whether such establishments exceeded the "25 percent tolerance of nonretail activities" (95 Cong. Rec. 11003, 11116, 12492–12499, 12508). The principal sponsors in both Houses (Representative Lucas and Senator Holland) repeatedly assured the legislators: "It is *only* in the sense that it clarifies *such doubt* that my amendment can be regarded as expanding the present exemption" (95 Cong. Rec. 11116, 12506; emphasis added).

The need for some amendment to this exemption, as both Representative Lucas and Senator Holland pointed out (95 Cong. Rec. 11002, 12492; *Aetna* Appx. 14, 32), had been recognized by the Administrator who had recommended the proposed amendment included in the original Lesinski bill (H. R. 5856).[24]

---

[24] The Lesinski proposal was:

"SEC. 13. (a) The provisions of sections 6, 7 and 12 shall not apply with respect to * * * (2) any employee of a retail or service establishment whose employer had a total annual volume of sales or servicing of not more than $500,000 during the preceding calendar year. An establishment shall not be deemed a retail or service establishment within the meaning of this subsection if more than 25 per centum of its annual dollar volume during the preceding calendar year was derived from activities other than retail selling or servicing. As used in this subsection, 'retail selling or servicing' means selling or servicing to private individuals for personal or family consumption, or selling or servicing (but not for resale) where (1) the goods sold or serviced do not differ materially either in type or quantity from goods normally sold or serviced for such personal or family consumption, or where (2) the customer is a farmer and the goods sold or serviced are of types and in quantities used by the ordinary farmer in his farming operations."

The Lesinski proposal (which was in substance the Administrator's recommendation) plainly contained no suggestion of any need for clarification or modification of the basic categories of businesses to which the then-existing administrative and judicial interpretations had restricted the exemption's applicability. The "doubt" which this proposal was designed to clarify related solely to the problem that the "consumers-use" (as distinguished from "business use") test could operate to disqualify particular establishments *in these basic eligible categories,* under the 25 percent "non-retail" tolerance standard. The legislative history demonstrates that the Lucas amendment, which was substituted for the Lesinski proposal, was designed simply to "clarify" (to be sure, not in the "identical" manner) this same doubt "in the precise field" which the Administrator had "urged Congress to clarify" (see 95 Cong. Rec. 12492–93, 12506, 12508; *Aetna* Appx. 32–33; 72–73). This is evident from the detailed tabular comparison made by Congressman Lucas of his amendment with the "present law" and with the Lesinski proposal, as well as from his and Senator Holland's explanations and specific illustrations of the problems for which the proposed amendment was designed.

Thus, in Congressman Lucas' tabular comparison, the only doubt in the "present law" mentioned was the doubt arising out of the administrative application of the "business use" test enunciated "in the *Roland Electical Company case* (326 U. S. 657)."[25]

[25] As poined out *infra*, pp. 41–42, the objection to the *Roland Electrical* decision was limited to the implications of its reasoning; its actual *holding* was expressly approved.

As described by him, the Lesinski proposal: "[d]enies the exemption to many large groups of retailers. This is done by denying the exemption to any retail or service establishment which sells more than 25 percent of its goods or services to customers who buy for business or nonpersonal or nonfamily uses * * *. The effect would be to write into the law expressly the rule laid down by the Supreme Court in the *Roland Electrical Co. case* * * * that no sale is retail if made to a purchaser for a business use" (95 Cong. Rec. A5231–32; *Aetna* Appx. 12–13). In contrast, Mr. Lucas described his own proposal as eliminating this "discriminatory limitation on the exemption found in the Lesinski bill," but retaining the "25 percent tolerance of nonretail activities"—"the same as the tolerance presently allowed by the Administrator and also proposed in the Lesinski bill"—"[s]ince almost any retail or service establishment does some selling which is not strictly regarded as retail, such as selling to purchasers who buy to resell" (*ibid.*). The main difference between the Lucas and Lesinski proposals was in the scope of the definition of nonretail sales *by retail establishments;* Congressman Lucas desired a broader definition than had previously been used.

In explaining the amendment on the floor of the House, Congressman Lucas again centered attention on the "doubt" created by the *Roland Electrical* case which, he reiterated, "gave rise to the view that many, perhaps most, of the establishments which *had previously been commonly recognized as retail* are not embraced within the exemption so written into the law" (95 Cong. Rec. 11003, emphasis added; *Aetna* Appx. 16). "Since practically every retail or service

establishment makes some such sales, this means," he said, "that the status of all retail and service establishments is doubtful under the present exemption." Answering specifically the criticism that his proposed amendment would expand "the present retail and service establishment exemption," he continued:

> *My amendment clears up that doubt by exempting the establishments which are traditionally regarded as retail. It is only in the sense that it clarifies such doubt that my amendment can be regarded as expanding the present exemption.* But in a real sense it is not expanding the exemption at all but simply confirming it for those establishments which the Congress always intended to exempt. [95 Cong. Rec. 11116, emphasis added; *Aetna* Appx. 22–23].

Senator Holland, the main sponsor in the Senate, was even more emphatic and specific regarding the limited purpose and effect of the amendment. After observing that the Administrator himself had recognized "the doubt which surrounds the meaning of the present retail and service establishment exemptions, and has urged Congress to clarify such doubt," Senator Holland continued:

> Mr. President, *that is the real milk in the coconut in our particular amendment.* It will be found upon reading the recommendations for changes as made by the Administrator of the Wage and Hour Act that he himself recommends a change. * * * I think it is proper at this time to say that *that it is the nub of this controversy,* because the Administrator himself has in so many words, and at considerable length, insisted that changes be made in the law,

> and he has recommended to the Congress that amendments be made [Emphasis added: 95 Cong. Rec. 12492–12493; *Aetna* Appx. 32–33].

Senator Holland made it clear that "the doubt" to which he referred, and which prompted the "only" substantial change that would result from the amendment, was "the doubt [which] arose because the Administrator and the courts, including the United States Supreme Court [in the *Roland Electrical* case, 326 U. S. 657*] ruled that the sale of goods and services for business use, as distinguished from family or household use, was not retail" (95 Cong. Rec. 12492, 12495, 12496, 12498, 12499; *Aetna* Appx. 32, 36–40, 45–55). And he repeatedly asserted that the proposed amendment was, in substance, confined solely to that problem. Quoting from the Administrator's recommendation for "incorporation in the act of specific language similar to that used in the tests applied by the divisions in determining the eligibility of an establishment for the exemption" and that "the basic test, in determining whether a sale is a retail sale, is the purpose of the buyer" (95 Cong. Rec. 12494; *Aetna* Appx. 34, 35), Senator Holland stated that "[o]ur amendment is *confined* to their effort [the effort of the "dry goods stores," the "small hotel" proprietor, the "merchants and the service people"] to get away from that kind of interpretation" (95 Cong. Rec. 12495, emphasis added; *Aetna* Appx. 36). He asserted and reasserted that:

> The only substantial difference between the Administrator and his recommendation and the

---

*See Senator Holland's explicit approval of the *Roland Electrical* holding, quoted *infra*, p. 42.

> amendment which we propose is that we propose to do away with this artificial distinction between a retail sale on the one hand and a business sale on the other, which, regardless of the size, and regardless of the fact that it is intrastate, can never be held to be a retail sale under the regulations or under the interpretative rulings of the Administrator. [95 Cong. Rec. 12498; *Actna* Appx. 46–47].[37]

Again, after disclaiming that the "proposed amendment would exempt any more employees than the present retail exemption," except "only in the sense that it clarifies such doubt", (repeating virtually verbatim the above quoted statement of Representative Lucas, *supra*, p. 38; 95 Cong. Rec. 12506; *Actna* Appx. 72–73), Senator Holland added this explanation of the limited differences between the Administrator's recommendations and those of the proposed amendment:

> Let it be perfectly clear that I am not saying that his recommendations are identical with those of the sponsors of this amendment, but several times in the course of my remarks I have said that he recognizes the necessity for action *in the precise field to which this amendment applies*, and that he recognizes the necessity for the adoption of some of the provisions of this amendment, because he requests the adoption of an amendment which will follow the

[37] Ironically enough, the basic test on which respondents here rely to claim the exemption is the very test which the amendment proposed "to do away with," *i. e.*, the distinction between "consumer" and "business" use (R. 124–125, 350–351; see *supra*, p. 29).

practice which has been laid down in the rulings he has made heretofore in this field.

Furthermore, I have pointed out that *there is only one area of substantial difference between the Administrator's recommendations and the provisions of this amendment, and that difference has to do with the artificial distinction the Administrator makes between business sales of any kind and retail sales.* Under his ruling, no business sale can be classified as a retail sale. [Emphasis added; 95 Cong. Rec. 12508; *Aetna* Appx. 74].

This "doubt" had arisen only with respect to establishments in the marketing and distributing field and the comparable service trades—*i. e.*, the field in which the retail-wholesale concept was usually and commonly (as well as in official and economic usage) associated—as distinguished from the separately classified fields of manufacturing, finance, real estate, public utilities, etc.

That the problem to which the sponsors referred was limited to the former narrow field in which the Administrator had applied the 25 percent tolerance standard, and had no reference to the non-exempt classification of the other fields or categories of businesses, is confirmed by the explicit legislative approval of the *holding* of the *Roland Electrical* decision (as distinguished from the implications of its reasoning) and of the non-exempt holding in *Kirschbaum* v. *Walling*, 316 U. S. 517. Thus, the Report of the Majority of Senate Conferees, after stating that the amendment would not change the non-exempt status of "banks, insurance companies, credit companies * * * etc.,"

added: "Nor does the conference agreement change the status of * * * establishments selling industrial goods and services to manufacturers engaged in the production of goods for interstate commerce and to other industrial and business customers (such as the establishment held nonexempt in *Roland Electric Co.* v. *Walling* * * *) or of firms renting or maintaining loft or office buildings (such as those held nonexempt in *Kirschbaum* * * *;" (95 Cong. Rec. 14877; *Aetna* Appx. 10). See also Senator Holland's explicit "Definitely not" answer to specific questions whether the *Roland Electrical Co.* or *Kirschbaum* cases would "be decided any differently under the proposed amendment?" He explained his negative answer on the ground that the kind of businesses in which those establishments were engaged "are wholly unrelated to the concept of retail selling or servicing" (95 Cong. Rec. 13505; *Aetna* Appx. 69–70).

In other words, the criticism of the *Roland Electrical* decision was confined to the application of its rationale in determining whether the types of establishments "traditionally regarded as retail" lost the exemption by reason of exceeding the 25 percent nonretail tolerance standard. Together with the repeated explicit approval of the administrative classification of other non-exempt businesses, this history shows unmistakably that the amendment was designed to apply only in the same "precise field" (see *supra*,

p. 40) in which the Administrator had previously applied the concepts of "retail" and "non-retail" selling or servicing.[28]

---

[28] Senator Holland was very explicit about this (95 Cong. Rec. 12505; *Aetna* Appx. 71–72):

> Q. Do many retail and service establishments engage in some wholesale or nonretail transactions?
>
> A. Yes. The Administrator recognizes this under his present interpretations which permit a retail or service establishment to devote 25 percent of its business to wholesale or nonretail selling or servicing without losing the exemption.
>
> Q. What tolerance or allowance for wholesale or nonretail selling or servicing is provided for in the proposed amendment?
>
> A. Twenty-five percent. The same as the Administrator allows under the present law. See the Administrator's 1948 Annual Report to Congress, page 119. Under paragraph (2) of the proposed amendment the 25-percent tolerance would be for transactions not recognized in the particular industry as retail selling or servicing such as sales for resale and quantity sales at a discount. As to laundries and cleaning establishments a 25-percent tolerance is provided for their sales of services to industrial customers.
>
> Q. *What type of service establishments would the proposed amendment exempt?*
>
> A. *Generally, restaurants, hotels, repair garages, watch-repair establishments, beauty parlors, barber shops, hospitals, farm equipment repair shops, laundries, dry-cleaning establishments, valet shops, battery shops, refrigerator repair shops, typewriter repair shops, taxicab companies, exterminator service companies* and other establishments performing local services. [Emphasis added.]

Even Senator Taft, who felt that the amendment did and should change the prior administrative interpretations more extensively than the majority Senate Conferees interpreted it, stated that he "felt very strongly that we were not in any way extending the exemption. We are simply reaffirming the position the Senate has taken heretofore. I am inclined to agree with the Senator in the view that there is no reason to make exemptions, though a few have been made, that were not exemptions under the original law" (95 Cong. Rec. 12516; *Actua* Appx. 98–99).[29] As summed up by Senator Taft, "everyone knew" what kind of "retail establishment" the exemption related to (95 Cong. Rec. 12515; *Actua* Appx. 95):

> "What is a retail establishment? I think everyone knew what a retail establishment was, and there were included in the list those who sold automobiles one by one, those who sold farm machinery to farmers. Retail stores of all kinds, hardware stores, the ordinary laundry, all but the most exceptional laundry, in the minds of all of us are retail establishments. Those are the establishments Congress intended to exempt. * * *[30]

[29] The excerpt quoted by the court below (R. 360–361) from Senator Taft's comments cannot be properly evaluated in isolation from its context in the legislative discussion. Even if intended to convey the sweeping implications inferred by the court, its persuasive value would be counteracted by the fact that Senator Taft's interpretation represented the minority interpretation of the conferees' agreement.

[30] It is significant that, in the legislative debates on the amendment, the estimates of the number of additional employees who would be deprived of protection by the amendment ranged from 25,000 to 200,000 (95 Cong. Rec. 12506, 12511,

B. THE STATUTORY LANGUAGE OF THE AMENDED EXEMPTION IS, ON ITS FACE, INAPPOSITE TO THE LOAN AND DISCOUNT BUSINESS

By its terms, Section 13 (a) (2), as amended (*supra*, p. 2), can be applied only to establishments engaged in making "sales of goods or services (or of both)" and which have an "annual dollar volume of sales." Respondents' business, which consists of lending money, purchasing conditional sales contracts, and taking applications for protective life insurance policies, can hardly be described as selling goods or services without distorting the natural, commonly understood, meaning of that language. As noted above, *supra*, p. 28, fn. 18, respondents have not espoused the position, taken by the court below, that this language must be read as incorporating the broad statutory definition of "goods" which was included in the original Act (obviously with reference to the coverage provisions then in the Act). To so read the language of the amended exemption is not only "to pervert the process of interpretation by mechanically applying definitions in unintended context" (see *Farmers Irrigation Co.* v. *McComb*, 337 U. S. 755 at 764),[31] but would be self-defeating so far as respond-

12515, 12517; *Aetna* Appx. 72, 77–78, 94–95, 99–101). If wholly new categories of businesses had been contemplated (such as banks, gas and electric utilities, credit and loan companies, newspapers, telephone companies, etc.), the estimates would have run into the several more hundred thousands or into the millions.

[31] In the *Farmers Irrigation* case, this Court rejected the contention that the definition of "production" in Section 3 (j) of the Act should be applied to the word "production" as used in the agriculture exemption, stating that "the legislative history confirms what a natural reading of the language of the

ents' loan and discount business is concerned. For if loan and discount transactions are "sales of goods or services" because the statutory definitions include "exchange * * * or other disposition" (Section 3 (k)) of "articles or subjects of commerce" (Section 3 (i)),[32] such "sales" are equally "sales for resale" (for re-"exchange" or re-"disposition").[33]

At best, the amendatory language as applied to such a business is full of ambiguities, whether read as including the statutory definitions or not. This was well illustrated by the obvious confusion of respondents' expert witnesses, when confronted with such questions as, for example, what is "the annual dollar volume of sales of a personal finance company," and "what exactly is being sold to the customer when the loan is made" and "whether anyone ever speaks of reselling credit" (R. 351, 353–354; Household Record, Vol. II, pp. 241a–242a).[34]

---

agricultural exemption would indicate—the word production was not there used in the artificial and special sense in which it was defined in § 3 (j)" (337 U. S. at 764).

[32] Sections 3 (k) and (i) are printed in full in the Appendix, *infra*, p. 59.

[33] The borrowers are clearly not the ultimate consumers of the money as are customers who purchase groceries, drugs, furniture, etc.; they borrow for the very purpose of redisposition or exchange for other goods or services. Nor does the borrower consume the lending "service" as a customer does the services of a barber shop, beauty shop, hotel or restaurant. Moreover, since 40 percent of respondents' business is derived from discount purchases of accounts receivable from dealers, they could not meet the 75 percent test, since at least this discount business is for resale (redisposition) by the dealers from whom the accounts are purchased. See *infra*, pp. 54–55.

[34] Respondents' agreed to the stipulation that a small loan company is not engaged in sales of "goods" (see the State-

The patent confusion and unrealities encountered in any attempt to apply the statutory language to the loan business confirms the conclusion reached by all of the other courts that "The fact is that there are certain types of transactions which simply cannot be fitted" into the statutory language and that any attempt to do so simply "creates an anomaly" (see Judge Kirkpatrick in *Household*, 106 F. Supp. at 547). The answer is that, here, as in *Farmers Irrigation, supra*, "the legislative history confirms what a natural reading of the language of the * * * exemption would indicate"—that the amended exemption used the terms "sales of goods or services" and "annual dollar volume of sales" in the same natural sense as they had been used in the administrative interpretation of the original exemption, *i. e.*, as applied

---

ment, *supra*, p. 4). Their claim is that the lending of money is "selling services" in the broadest economic sense of those terms. Their witness Leon Henderson admitted some difficulty over the use of the word "sale," stating to the court: "I am somewhat cautious, Your Honor, on this matter of the word 'sale' because I spoke of these salary buyers, and we always looked at a transaction as not being a sale * * *;" only on the theory that "everything in business or industry has to be the sale of a service or the sale of goods," could he say that the lending of money would be a sale of services (R. 349–350). Witness Schmus testified that what was being sold was "a medium of exchange," and, was obviously non-plussed by the question regarding "annual dollar volume of sales." His immediate reaction was "I am not too sure that I follow that: the annual dollar sales of a personal finance company" (R. 353). He finally said that it was the amount of the loans the company made to the borrowers. It was never made clear just what these witnesses regarded as the "annual dollar volume of sales" within the statutory language—whether it was the amount of the money loaned, or the amount of interest earned, or the total amount of payments made by the borrowers.

to merchandising establishments, "epitomized by the corner grocery, the drug store and the department store" and the comparable "service" trades "akin to retail establishments" except that "their revenue is derived primarily from the sale of service instead of from the sale of merchandise" (Interpretative Bulletin No. 6, 1942 WH Manual 326, par. 24; *Aetna* Appx. 3).

C. IN ANY EVENT, THE TRIAL COURT'S CONCLUSION THAT RESPONDENTS FAILED TO ESTABLISH THAT ALL REQUIREMENTS FOR THE EXEMPTION HAD BEEN MET REPRESENTS A CORRECT APPRAISAL OF THE CONFLICTING EXPERT EVIDENCE

As the trial court noted: "Exemptions which withdraw from employees the benefits prescribed by the Act are to be strictly construed," and "[t]he burden rests on the party asserting any exemption to establish that all requirements for the exemption have been met" (R. 83).[35] While the trial court made no find-

[35] It is, of course, well-settled by this Court's decisions that any exemption from this Act must be "narrowly construed" and restricted to those "plainly and unmistakably within its terms and spirit" (*Phillips Co.* v. *Walling*, 324 U. S. 490, at 493; *Powell* v. *United States Cartridge Co.*, 339 U. S. 497, at 517; *Addison* v. *Holly Hill Co.*, 322 U. S. 607, at 617).

Equally well-settled is the principle that the employer claiming exemption has "the burden of proving the existence of [the] conditions" for exemption (*Walling* v. *General Industries Co.*, 330 U. S. 545, 548; *Casa Baldrich, Inc.* v. *Mitchell*, 214 F. 2d 703 (C. A. 1), and *Armstrong Co.* v. *Walling*, 161 F. 2d 515, 517 (C. A. 1); *Helliwell* v. *Haberman*, 140 F. 2d 833 (C. A. 2)). As pointed out, *infra*, p. 55 in the text, the burden of proof rule has particular significance in determining whether the conditions of the amended Section 13 (a) (2) have been met because the legislative intent to impose upon the employer the burden of proving the specific conditions of this exemption was explicitly and emphatically stated.

ing of fact, as such, on the question whether respondents are engaged in "sale of goods or services (or of both)," it concluded that "[t]he lending of money does not constitute the sale of either goods or services within the intendent of the Section 13 (a) (2) exemption" (R. 84). Much of respondents' expert evidence, of course, was designed to prove that the lending of money is "selling of services," and this evidence conflicted with the evidence of the Government experts.[30] The trial court's conclusion on this point, therefore, is, we submit, equivalent to a resolution of this conflicting evidence in favor of the Government. The failure to prove this basic condition is alone sufficient to support the trial court's decision, since Section 13 (a) (2) by its express terms presupposes that the establishment is engaged in making "sales of goods or services (or of both)." Absent this basic prerequisite, there is no occasion to apply the percentage or the "industry recognition" tests, as indeed there is no "annual dollar volume of sales" to which these tests can be applied.

The finding of the trial court that small loan companies "are regarded in the financial industry as retail service establishments" (even if the finding had not been carefully limited as "subject to the same qualifications" expressed by Judge Kirkpatrick in *Household*) (R. 83), is inadequate to supply the deficiency in respondents' evidence on the "sales of

[30] Respondents' experts testified that "everything in business or industry has to be the sale of a service or the sale of goods" (R. 350; also see *supra*, p. 7, fn. 6), whereas the Government experts testified that the lending of money cannot accurately be described as either "sales" or "services." See *supra*, pp. 7–8.

service" condition. Indeed, this finding itself, limited as it is by crucial "qualifications," falls far short of meeting the "industry recognition" test. For the "qualifications," as Judge Kirkpatrick clearly pointed out, are that both the terms "retail" and "service," as used in a broad, loose or analogous sense by the financial industry, mean something quite different from their meaning as used in the statutory exemption.[37] In short, Judge Kirkpatrick's "qualifi-

[37] The sweeping implications of the loan companies' contention were discerningly described by Judge Kirkpatrick in *Household*, as follows (106 F. Supp. 541, 545, 547):

"* * * Used in a very broad generic sense, the word 'services' could apply to almost any economic endeavor and in that sense everybody who receives a payment for doing anything, including the transfer of property by sale, could be described as performing some kind of service. Incidentally, one of the difficulties involved in taking what an industry thinks or says about itself as the final and decisive factor in determining what constitutes a retail service establishment within the meaning of the Act is thus apparent. I suppose that it would not be too difficult for any trade association to adopt a deliberate policy of calling its business a 'service' business, a policy which, if persisted in long enough, could ripen into such recognition in the industry as would support plenty of testimony very much like that the defendant here has produced.

* * * * *

"* * * Expert witnesses called by the defendant testified that every form of economic transaction resulting in gain to either party must necessarily be a sale or the performance of a service * * *."

The judge concluded that Congress, in enacting the amendment, clearly had no intention thus "to hand over to any industry the right to judge whether it or any one of its branches was exempt as a retail service establishment" (*Id.* at 545).

cations" amounted to a finding that the expressions "service" and "retail" in the financial industry (in contrast to their usage in the "mercantile field") reflect simply the "very broad generic sense" and "overworked" usage of the terms, of little or no assistance in determining "the kind of recognition in the industry which Congress had in mind." (106 F. Supp. at 544–45). In the words of the First Circuit in *Aetna*, "Such usage hardly has relevance to the intended meaning of the term 'service establishment' as used in § 13 (a) (2)" (247 F. 2d at 193).

This explains why Judge Kirkpatrick and all of the other courts, except the majority below, have considered this "finding" to be "immaterial" (see District Court's Fdg. No. 7, R. 83). It is, in effect, a finding that the evidence failed to meet the "industry recognition" test in the sense that Congress intended the test to be applied. As pointed out by the First Circuit in *Aetna*, the legislative history plainly shows the inadequacy of the type of self-generated and self-serving evidence adduced by respondents. Not only did "the sponsors of the amendatory legislation repeatedly disavow[ed] an intention to permit each industry to decide for itself whether it was conducting a 'retail or service establishment' within the meaning of the exemption" (*Aetna*, 247 F. 2d at 193), but they stressed that the more impartial and informed determination of the Administrator was to be given particular weight, and that "the burden of showing" the conditions of the 75 percent test would definitely be on "each employer claiming the exemption".

Senator Holland not only expressly stated that it was the judgment of the sponsors that "we are simply using words and terms in the way they are customarily understood, just as was done on the passage of the original act" (95 Cong. Rec. 12510; *Aetna* Appx. 75); he also categorically denied that the "industry recognition" language would throw the situation open for each industry to determine whether its sales shall be considered retail or wholesale; *Aetna* Appx. 75–77). It was expressly pointed out that "*in* the particular industry" does not mean "*by*" the particular industry. Responding to Senator Aiken's inquiry, "Who does the recognizing?", Senator Holland answered: "The Administrator, the courts, the merchant, his employees, the enforcement officer, and everyone else." Senator Aiken then added: "If these words would permit each industry to decide for itself whether sales were retail or not, I could see considerable objection to the amendment" *ibid.*; *Aetna* Appx. 77). Senator Holland gave repeated assurances that, while the trade association's interpretation might be "one criterion," no one "and certainly not the Senator from Florida [the main sponsor of the provision as enacted], would wish to delegate full authority in the matter to a trade association or any other interested group" (95 Cong. Rec. 12501; *Aetna* Appx. 58).[38]

---

[38] For more comprehensive discussion and excerpts from the debates see the Department's Interpretative Bulletin on this exemption. 29 CFR, 1958 Supp., 779.8.

The Congressional debates clearly reflect an intent to give particular weight to the interpretation of the Administrator with respect to the "industry recognition" test. In answer to a

Virtually all of respondents' evidence relating to the "industry recognition" test was of a self-generated and self-serving nature,[39] and was contradicted

---

question by Senator Douglas as to who is to define what is recognized as retail sales or services in the particular industry, Senator Holland replied, "Who but the Administrator?" (95 Cong. Rec. 12501), observing that there would, of course, always be "access to the courts" if the individual person concerned did not regard the administrative ruling as sound (95 Cong. Rec. 12502). Representative Lucas, commenting on the practical difficulties involved in determining the question of recognition in the particular industry, said:

> The other charge against my amendment has been that it would make the exemption difficult, if not impossible, to apply, because years of litigation would be required to ascertain what is recognized as a retail sale in various industries. This charge is completely baseless. The Administrator, through his 11 years of administration of the existing law, has come to know quite well what sales and services are recognized as retail in each particular industry [95 Cong. Rec. 11116].

Thus, the net import of the legislative debates on this point plainly reflects an intent to give particular weight to the Administrator's interpretation which would reflect a much broader and greater variety of interested views and a more impartial and informed judgment than could be expected from the self-interested industry, or that could possibly be acquired by a court from a single case. In this special situation, therefore, there is particularly forceful reason for giving to the administrative interpretation the great weight commended by this Court in *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 139–140.

[39] The record as a whole clearly corroborates Judge Kirkpatrick's characterization of respondents' evidence on the existence of a retail concept in the financial industry as merely "an analogy borrowed from the mercantile field * * * very much in the same way that, as one of defendant's witnesses testified, 'the fellows around the bank' (the Bankers Trust Company of New York) call the bank's installment department 'the bargan basement.'" Such broad, loose, usage of the words "service" and "retail", Judge Kirkpatrick concluded, is

not only by the administrative interpretation and judgment but also by objective well-qualified experts and by standard Government reports and publications. The trial court below (and all of the trial courts in the other loan company cases) clearly evaluated this evidence correctly and according to the standards intended by Congress. Certainly, at the very least, this appraisal of the evidence was not so clearly erroneous as to warrant reversal on appeal. On the contrary, we submit that the standard by which the Sixth Circuit appraised the evidence, ignoring the legislative intent, was clearly erroneous.

In addition to these deficiencies in respondents' "industry recognition" evidence—and this is wholly apart from the fundamental question whether the "industry recognition" test has any application whatever to credit companies (see *supra*, pp. 25–33, 45–48)—respondents' evidence is also defective in another important respect, *i. e.*, the patent lack of support for its claim that the discount portion of its business is

---

plainly "not the determining factor in resolving the issue at hand," since it is "doubtful" that this is "the kind of recognition in the industry which Congress had in mind" (*Household*, 106 F. Supp. at 544–545). Like the loose use of the term "service," the evidence shows that the term "retail" in this industry has been used for little other than "advertising and public relations value" (see *Household*, 106 F. Supp. at 545), having had its origin and connotation in the efforts of small loan companies to be relieved of the usury laws and to justify their high interest rates (see the Statement, *supra*, p. 10). However legitimate it might be for the industry to draw such an analogy as an argument to fortify its public-relations or lobbying purposes, it is quite another matter to seek to take advantage of this self-serving analogy in order to avoid the labor standards of this Act.

retail selling. The discount transactions, which are described in the stipulation (agreed to by respondents) as "purchases" and "purchasing" of conditional sales contracts from dealers (R. 8–9), admittedly account for 40 percent of respondents' gross dollar volume of business (R. 80, 82).

In sum, the trial court's conclusion that respondents had not met their burden of proof is amply sustained by the record. The burden of proof rule has particular significance in construing the "industry recognition" test of Section 13 (a) (2), because Congress, as evidenced by its debates and reports on this provision, explicitly indicated its reliance upon this rule to make the application of this test administratively workable. The sponsors of the amendment emphasized that the burden would be on the employer to show that he qualified under this test and that it imposed "no additional burden or duty * * * upon the Administrator" (95 Cong. Rec. 12502, *Aetna* Appx., 64). Thus, the Statement of the Majority of the Senate Conferees on the Conference Report of the Amendments as enacted states unequivocally:

> It is the intent of the conference agreement to place on each *employer* claiming the exemption the *burden* of showing that 75 percent of the particular establishment's sales are not for resale *and* are recognized as retail in the particular industry. [95 Cong. Rec. 14877; *Aetna* Appx. 9–10; emphasis added.] [40]

[40] In explanation, Senator Holland repeatedly made a special point of emphasizing this:

> * * * An *employer* claiming exemption would have the *burden* of proving to the courts that, in fact, 75 percent

of his sales or services are recognized as retail in his industry.

I digress at this point long enough to remind the Senate that *no additional burden or duty is placed upon the Administrator by this act, but that, to the contrary, the burden is placed upon the employer claiming exemption to show that, in fact, 75 percent of his sales or services are recognized as retail in his particular industry.*

* * * * * * *

* * * Moreover, it should be remembered that *any employer who asserts that his establishment is exempt must assume the burden of proving* that at least 75 percent of his sales are recognized in his industry as retail. *This is not a task which the Administrator has to assume.*

Anyone claiming an exemption does it with full knowledge that the burden is upon him to establish to the sound satisfaction of the Administrator or his agents that more than 75 percent of the sales have been made at retail, and, of course, on the intrastate level in the community in which the business is located [95 Cong. Rec. 12502; *Aetna* Appx. 64, 66; emphasis added].

Similarly, the chief proponent of this proposal in the House, Representative Lucas, assured his colleagues:

* * * The *employer* claiming exemption would have the *burden* of proving that at least 75 percent of his sales are recognized as retail in his industry [95 Cong. Rec. 11116; *Aetna* Appx. 23; emphasis added].

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

STUART ROTHMAN,
Solicitor,

BESSIE MARGOLIN,
Assistant Solicitor,

SYLVIA S. ELLISON,
Attorney,
Department of Labor.

JANUARY 1959.

APPENDIX

The Fair Labor Standards Act of 1938, as amended (c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910, 29 U. S. C. 201), provides in pertinent part:

SEC. 7. [63 Stat. 912–913]:

(a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

SEC. 13. [63 Stat. 917]:

(a) The provisions of sections 6 and 7 shall not apply with respect to * * * (2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry;[1] or (3) any employee employed by any establishment engaged in laundering, cleaning or repairing clothing or fabrics, more than 50

[1] Prior to the 1949 amendments, Section 13 (a) (2) read simply: "Any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce" (52 Stat. 1067).

per centum of which establishment's annual dollar volume of sales of such services is made within the State in which the establishment is located: *Provided,* That 75 per centum of such establishment's annual dollar volume of sales of such services is made to customers who are not engaged in a mining, manufacturing, transportation, or communications business; or (4) any employee employed by an establishment which qualifies as an exempt retail establishment under clause (2) of this subsection and is recognized as a retail establishment in the particular industry, notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells: *Provided,* That more than 85 per centum of such establishment's annual dollar volume of sales of goods so made or processed is made within the State in which the establishment is located; * * *.

SEC. 3. [52 Stat. 1061] As used in this Act—

* * * * *

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.